Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

ANDREA D. LEE,

Petitioner,

v.

GTE FLORIDA, INCORPORATED,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Eleventh Circuit disregarded this Court's decision in *Reeves v. Sanderson Plumbing Products*, and held Petitioner to the stricter "Pretext Plus" standard for proving pretext in an employment discrimination case, thereby continuing the conflict in the law regarding this issue.

2. Whether the Eleventh Circuit committed error when it relied largely upon the testimony of Respondent's decision maker to overturn the jury's verdict in favor of Petitioner and reverse the District Court's denial of Respondent's four motions for judgment as a matter of law, when the Petitioner presented substantial evidence to the jury which cast doubt as to the credibility of Respondent's decision maker and the truthfulness of Respondent's articulated reason for not promoting the Petitioner.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Andrea D. Lee, respectfully petitions the Court for a writ of certiorari to review the final judgment of the United States Court of Appeals for the Eleventh Circuit, entered September 13, 2000, which reversed the final judgment of the United States District Court for the Middle District of Florida.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 226 F.3d 1249 (11th Cir. 2000) (App., *infra*, 1). The opinion of the United States District Court for the Middle District of Florida is not reported and is reprinted in the Appendix (App., *infra*, 15).

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered September 13, 2000. The Eleventh Circuit denied Petitioner's timely petitions for rehearing and rehearing en banc on November 15, 2000. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED IN THIS CASE

Petitioner's underlying claim arose under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) which states as follows:

(a) It shall be an unlawful employment practice for an employer –

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Respondent's basis for appeal to the Court of Appeals for the Eleventh Circuit arose under Rule 50(a) and (b) of the Federal Rules of Civil Procedure, which state as follows:

(a) **Judgment as a Matter of Law.**

(1) If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law

be maintained or defeated without a favorable finding on that issue.

(2) Motions for judgment as a matter of law may be made at any time before submission of the case to the jury. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment.

(b) **Renewing Motion for Judgment After Trial; Alternative Motion for New Trial.** If, for any reason the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the courts's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment – and may alternatively request a new trial or join a motion for a new trial under Rule 59. In ruling on a renewed motion, the court may:

(1) If a verdict was returned:

(A) allow the judgment to stand,

(B) order a new trial, or

(C) direct entry of judgment as a matter of law; or

(2) if no verdict was returned;

(A) order a new trial, or

(B) direct entry of judgment as a matter of law.

STATEMENT OF THE CASE

Petitioner, Andrea D. Lee ("Lee") was employed by Respondent, GTE Florida, Incorporated ("GTE") for 24 years, 22 of these years she spent in the Real Estate Department. Lee was responsible for the management of GTE real property which included the buying, selling, and leasing of real property. In February of 1980, Lee was promoted to the position of Senior Planning Analyst, a Salary Level 5 management position. During the next few years, Lee's duties were expanded to include responsibility for a larger geographic territory and greater responsibilities in the areas of planning and budgets.

In addition, Lee assumed a larger role in the operations of the department, Lee was responsible for participating in departmental meetings on her Level 7 supervisors' behalf and would be placed in charge of the Real Estate Department when her supervisor was on vacation. By the end of the 1980's, Lee was responsible for managing GTE's real estate needs for nine southeastern states.

Persons in management positions at GTE manage either GTE people or they manage processes. During her 22 years in GTE's Real Estate Department, Lee did both. In 1989, Lee was asked by upper management to draft the "Proposed Leasing Process" which set uniform leasing standards and procedures to be utilized in the southeast by GTE. In 1991, Lee was asked to chair a task force on lease reduction for the purpose of reevaluating all of GTE's leases in the southeastern states. As Chair, Lee was responsible for managing and coordinating GTE real estate managers in nine states in the southeast. Lee also

planned and implemented other projects including the Dulles Airport Headquarters Building in Virginia and the Tampa City Center consolidation in Florida.

In the Dulles project, Lee was instructed by upper management to sell the facility, which had an appraised value of $5,000,000. However, due to the fact that GTE did not own the land on which the facility was built, Lee knew a sale would be difficult. Therefore, Lee devised and implemented a plan whereby the facility was to be leased to the U.S. Government for a ten year period for a total of $17,500,000. With regard to the Tampa City Center consolidation, Lee devised and implemented a plan whereby several GTE business units, which were located throughout the Tampa Bay area, would be relocated to the Tampa City Center building, as the leases for the separate facilities expired. Lee's plan thereby concentrated a large number of GTE operations in the same location and made GTE the anchor tenant of the 38 story Tampa City Center building.

In 1993, a task force decided the real estate needs of all of GTE's business units nationwide would be placed under the direction of Thomas Schaffer, as Director of Real Estate Services. The United States would be divided into three zones, representing the western, central, and eastern regions of the country. Each zone would be headed by a person titled Manager Real Estate Services, who would report directly to Mr. Schaffer. Since the basic purpose, principal responsibilities, and specialized or technical knowledge required for the East Position (hereinafter the "Position"), which were stated on the Position posting were virtually identical to the responsibilities that Lee had come to perform for GTE, she applied for

the Position. Lee, was chosen as one of the top contenders, and interviewed with Mr. Schaffer. However, Mr. Schaffer selected a male employee, Colin Hines, for the East Position. In fact, Mr. Schaffer filled all three positions with men. At trial Mr. Schaffer claimed that he initially offered the Central Position to a woman, Janeen Travillyan, but that she turned him down. Also at trial, Lee presented GTE's own documentary evidence which demonstrated that Ms. Travillyan never applied for the Central Position.

Because she felt that she had been the subject of illegal sex discrimination, Lee contacted GTE's human resources department to file an Internal EEO Complaint. During the Internal EEO investigation, Mr. Schaffer drafted a letter to the investigator which purported to provide his explanation as to why he chose to hire Mr. Hines over Lee. However, Mr. Schaffer's explanation contained in this letter contradicted earlier documents Mr. Schaffer had prepared regarding the duties and qualifications for the Position. After a very brief investigation, GTE's Human Relations Department concluded that there was no discrimination in the selection process for the Position. Since Lee's job was eliminated and she was not able to obtain any other position within GTE, she lost her job in a reduction in force in November of 1994.

On or about September 18, 1995, Lee filed a four count Complaint and Demand for Jury Trial against GTE, including the following claims: Count I, sex discrimination under Title VII, 42 U.S.C. § 2000e-2(a), and Chapter 760 of the Florida Statutes, for failure to promote; Count II, age discrimination under the ADEA for failure to promote; Count III, retaliatory termination under Title VII

and ADEA; and Count IV, violations of ERISA. Lee served her First Amended Complaint on January 3, 1996, alleging the same four causes of action that were alleged in her original Complaint. Lee's claims for retaliation and ERISA violations were disposed of by the District Court pursuant to the order dated September 18, 1997, which granted GTE's motion for partial summary judgment regarding these claims.

Lee's sex and age discrimination claims were tried before a jury on December 1 through 4, 1997, and December 8, 1997. At the close of Lee's case in chief, GTE moved for Judgment as a Matter of Law under Fed. R. Civ. P. 50(a), which was denied by the District Court Judge. GTE rested without calling any witnesses and renewed its Motion which was once again denied by the District Court Judge. On December 8, 1997, the jury returned a verdict in Lee's favor on her sex discrimination claim, awarding Lee $216,000.00 for back pay (including pension benefits) and $250,000.00 in punitive damages.

On December 16, 1997, GTE renewed its Motion for Judgment as a Matter of Law or, in the Alternative, for New Trial under Fed. R. Civ. P. 50(b) and Lee filed her response on January 5, 1998. On December 23, 1997, Lee filed her Motion for Reinstatement, or in the Alternative, for Front Pay Damages. On April 3, 1998, the Trial Court denied GTE's Renewed Motion for Judgment as a Matter of Law as it pertained to Lee's sex discrimination claim, but granted the Motion as it pertained to the jury's punitive damage award. (App. 17). On April 7, 1998, the Clerk entered Judgment in favor of Lee for $216,000.00.

GTE filed its Post-Judgment Motion for Judgment as a Matter of Law on April 10, 1998, and Lee refiled her Motion for Attorney's Fees and Costs on April 20, 1998. On August 26, 1998, the District Court granted Lee's Motion for Reinstatement, or in the Alternative, Motion for Front Pay and on August 28, 1998, entered an Order Amending Final Judgment to include the front pay award of $98,647.00 and the stipulated attorney's fees and costs in the amount of $100,000.00. (App. 30 & 36). The total amount of Lee's Judgment award was now $414,647.00. On September 3, 1998, the Trial Court denied GTE's renewed Post-Judgment Motion for Judgment as a Matter of Law.

GTE filed its Notice of Appeal on August 26, 1998. Lee filed a Notice of Cross-Appeal on October 9, 1998. After the parties had filed their respective briefs, oral arguments were heard before a three judge panel of the Eleventh Circuit on December 6, 1999. On September 13, 2000, the Panel rendered its opinion in this matter which reversed the District Court's denial of GTE's Motion for Judgment as a Matter of Law, and remanded the case back to the District Court to enter judgment in GTE's favor (App. 1). Lee then timely filed her Petition for Rehearing *En Banc* which was denied by the Eleventh Circuit by Order dated November 15, 2000. (App. 38). This Petition for a Writ of Certiorari timely followed.

REASONS FOR GRANTING THE PETITION

I. THE ELEVENTH CIRCUIT DISREGARDED THIS COURT'S DECISION IN *REEVES V. SANDERSON PLUMBING PRODUCTS* AND HELD LEE TO THE STRICTER PRETEXT PLUS STANDARD FOR PROVING PRETEXT IN AN EMPLOYMENT DISCRIMINATION CASE, THEREBY CONTINUING THE CONFLICT IN THE LAW REGARDING THIS ISSUE.

On June 12, 2000, this Honorable Court handed down its unanimous decision in the case of *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S.Ct. 2097 (2000), which was to resolve a split in the Circuit Courts of Appeal regarding the standard of proof the plaintiff in an employment discrimination case must present in order to prove pretext under the *McDonnell Douglas*[1] burden shifting test. Prior to the *Reeves* decision, some circuits held that "a plaintiff's prima facie case of discrimination . . . combined with sufficient evidence for a reasonable fact-finder to reject the employer's nondiscriminatory explanation for its decision, is adequate to sustain a finding of liability for intentional discrimination."[2] However, other circuits followed what was labeled the "Pretext Plus" standard which stated that the plaintiff in an employment discrimination case must introduce sufficient evidence for the jury to find not only that the employer's articulated

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[1] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973).

[2] See *Reeves* at 2104. According to this Court in the *Reeves* case, the circuits that applied such a standard were the Third, Seventh, Eighth, Ninth, and Eleventh.

nondiscriminatory reason for taking the adverse employment action was false, but also that the real reason for the adverse employment action was discrimination.[3]

In *Reeves*, this Court clearly held that the "Pretext Plus" standard articulated above, did not correctly state the quantum of evidence necessary for a plaintiff to prove pretext in an employment discrimination case. Therefore, this Court stated that the correct statement of the pretext standard was to be as follows:

> The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination.

Reeves at 2108, citing *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 511 (1993).

However, in its opinion in the instant case, the Eleventh Circuit ignored this Court's holding in *Reeves* and held Lee to the more stringent "Pretext Plus"standard for proving pretext.[4] Specifically, the Eleventh Circuit stated

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[3] *Reeves*, at 2105. According to the *Reeves* decision, the circuits that followed the "Pretext Plus" standard were the First, Second, Fourth, and Fifth.

[4] *Lee* (App. 7). It is interesting to note that the Eleventh Circuit handed down its decision in the instant case on September 13, 2000, and this Court decided the *Reeves* case on June 15, 2000. Therefore, the pretext standard articulated in *Reeves* was published a full three months before the Eleventh

> In a failure to promote case, a plaintiff cannot prove pretext by simply showing that she was better qualified than the individual who received the position that she wanted. A plaintiff must show not merely that the defendant's employment decisions were mistaken but that they were in fact motivated by sex.

Lee (App. 7). *Reeves* also holds that evidence of pretext is determined by examining all of the plaintiff's evidence as a whole. *Reeves*, at 2110. The Eleventh Circuit, on the other hand, evaluated the pretext issue by examining each individual piece of evidence presented by Lee, and then deciding that *each* individual piece of evidence was not sufficient, *on its own*, to prove pretext. The Eleventh Circuit then dismissed the significance of that particular piece of evidence altogether. The Eleventh Circuit then proceeded to the next piece of evidence and performed the same type of examination. Once the Eleventh Circuit had completed this piecemeal examination and had dismissed the significance of each piece of evidence on its individual merits, the Eleventh Circuit then concluded that since no evidence of pretext remained, Lee had not proven pretext under the *McDonnell Douglas* test, and therefore, Lee had not proven her case.

Circuit rendered its decision in the instant case. However, in its published opinion in *Lee*, the Eleventh Circuit did not mention or cite the *Reeves* decision, even though the *Reeves* decision was relevant and had been cited by the Eleventh Circuit in two separate opinions published before the *Lee* decision. See *E.E.O.C. v. Joe's Stone Crab, Inc.*, 220 F.3d 1263 (11th Cir. 2000) and *Munoz v. Oceanside Resorts, Inc.*, 223 F.3d 1340 (11th Cir. 2000).

By examining Lee's evidence in this piecemeal fashion, the Eleventh Circuit has ignored this Court's warning in *Reeves* that "the question facing triers of fact in discrimination cases is both sensitive and difficult," and that "[t]here will seldom be 'eyewitness' testimony as to the employer's mental process," *Reeves* at 2105 citing *U.S. Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 716, 103 S.Ct. 1478, 75 L.Ed.2d 403 (1983). Thus, this Court recognizes that evidence of discrimination is often very subtle and is seldom overt and obvious. Therefore, it is necessary that courts examine all of the plaintiff's evidence of pretext "as a whole", under the totality of the circumstances, and not in a piecemeal manner.

The Eleventh Circuit's piecemeal examination of evidence, as set forth in the *Lee* case, is analogous to the examination of a television screen. When one examines a television screen from very close, all one sees is a series of small dots of colored light, which standing alone have little significance. However, when one views this same television screen from a distance, these individual dots form a picture and this picture conveys a story to the viewer. At trial, the jury examined all of the individual pieces of evidence that Lee presented and all of the individual inconsistencies in Tom Schaffer's testimony, stood back and looked at the big picture that was formed by these individual pieces of evidence – and the picture the jury saw was that GTE, through Tom Schaffer, discriminated against Lee on account of her sex.

In her concurrence in *Reeves*, Justice Ginsburg stated:

> . . . unless it is conclusively demonstrated, by evidence the district court is required to credit on a motion for judgment as a matter of

> law, . . . that discrimination could not have been the defendant's true motivation. If such conclusive demonstrations are (as I suspect) atypical, it follows that the ultimate question of liability ordinarily should not be taken from the jury once the plaintiff has introduced the two categories of evidence described above.

Reeves at 2112.

If this Court allows the Eleventh Circuit's published opinion in *Lee* to stand, when this opinion continues to cling to the "Pretext Plus" standard that was discarded in *Reeves*, this Court will permit the maintenance of a continued source of conflict on the pretext issue.

II. THE ELEVENTH CIRCUIT COMMITTED ERROR BY DEVIATING FROM ESTABLISHED PRECEDENT WHEN ENTERTAINING A MOTION FOR JUDGMENT AS A MATTER OF LAW; SPECIFICALLY, THE COURT DID NOT REVIEW ALL OF THE EVIDENCE IN THE RECORD, DID NOT DRAW ALL REASONABLE INFERENCES IN FAVOR OF THE NONMOVING PARTY, MADE CREDIBILITY DETERMINATIONS OR REWEIGHED THE EVIDENCE, AND SUBSTITUTED ITS OWN CREDIBILITY DECISIONS FOR THOSE OF THE JURY.

When reviewing the Eleventh Circuit's Opinion in the *Lee* case, it is apparent that the Eleventh Circuit did not follow established precedent set forth by this Court regarding the appellate court's role in reviewing motions for judgment as a matter of law and the strict limitations placed upon the appellate court in its consideration of the evidence. Specifically in the *Reeves* case, this Court cited

to several of its previous decisions on this issue and summarized the appellate court's role as follows:

> [I]n entertaining a motion for judgment as a matter of law, the court should review all of the evidence in the record . . . In doing so, however, the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determination or weigh the evidence . . . Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge . . . Thus, although the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe . . . That is, the court should give credence to the evidence favoring the nonmovant as well as that "evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that evidence comes from disinterested witnesses." (U.S. Supreme Court's internal citations omitted).

Reeves, at 2110. However, in its *Lee* Opinion, the Eleventh Circuit deviated from this established precedent by disregarding critical evidence favorable to Lee, namely the evidence supporting Lee's prima facie case and the evidence which undermined GTE's nondiscriminatory explanation. The Eleventh Circuit also failed to draw all, or any for that matter, reasonable inferences in favor of Lee. Lastly, the Eleventh Circuit impermissibly accepted as true and uncontradicted much of Mr. Schaffer's trial testimony, even when Lee presented credible conflicting evidence.

Specifically, when comparing Lee's qualifications with those of Colin Hines, the male employee Tom Schaffer selected for the Position, the Eleventh Circuit discusses Hines' qualifications but completely ignores and disregards Lee's qualifications. For example, the Eleventh Circuit states that Hines "had strong managerial skills, that he had direct supervisory responsibility for over 25 employees since 1982 . . . " (App. 10). However, the Eleventh Circuit does not even mention the evidence Lee presented regarding her managerial skills which included: supervising outside real estate brokers; chairing a lease reduction task force; and managing the real estate department whenever her supervisor was out.

Additionally, the Eleventh Circuit did not even address the fact that there was conflicting evidence presented regarding the meaning of the term "manage" and its use in the Position Questionnaire and Position Posting. Specifically, evidence was presented at trial that at GTE, persons in management positions manage either people or they manage processes. Further, conflicting evidence, from disinterested witnesses, was presented to the jury regarding which of the two kinds of "management" was more important for the Position. Also, the Eleventh Circuit completely disregarded the substantial evidence that Lee presented regarding the abundant experience she had in both forms of management.

The Eleventh Circuit similarly mistreated the evidence regarding Lee's and Hines' strategic planning qualifications. To begin with, there was undisputed evidence presented at trial that the actual "strategic plan" for GTE was created at the highest levels of GTE management, and that all other GTE management level employees

merely implemented the "strategic plan." In its opinion, the Eleventh Circuit states that "Hines had substantial experience in strategic planning dating back to 1978 . . . " (App. 10). However, once again, the Eleventh Circuit ignored, and did not even mention, Lee's experience in strategic planning. Lee was asked to draft the "Proposed Leasing Process" standards to be utilized by GTE in the Southeast. Lee also testified about several lease consolidation projects she prepared and implemented including the Dulles Airport Headquarters Building in Virginia and the Tampa City Center consolidation in Florida.

Lastly, with regard to the "requirement" of a college degree for the Position, the Eleventh Circuit did not even address the fact that there was substantial conflicting evidence presented to the jury as to whether the college degree was "required" or merely "desirable." (App. 25). Based on this evidence, the jury could have reasonably concluded that a college degree was merely "desirable" and not really "required" as a prerequisite for the Position, as Tom Schaffer later claimed.

Since the factual statements and conclusions set forth in the Eleventh Circuit's Opinion overwhelmingly favor GTE over Lee, it is apparent that rather than considering all of the record evidence, the Eleventh Circuit only considered evidence favorable to GTE. Further, since the factual conclusions contained in the Eleventh Circuit's Opinion are so skewed in favor of GTE, even though Lee presented competent and substantial evidence that conflicted with GTE's evidence, as briefly set forth above, the Eleventh Circuit apparently did not draw all reasonable factual inferences in Lee's favor as the nonmoving party.

Further, regarding the issue of credibility, the Eleventh Circuit has previously held that in deciding whether the employer's proffered nondiscriminatory reason is contrived, "the jury must perform its traditional duties of assessing the credibility of the witnesses through observation of trial testimony and of weighing the evidence – tasks peculiarly within the province of the jury." *Combs v. Plantation Patterns*, 106 F.3d 1519, 1538 (11th Cir. 1997), *cert. denied*, 522 U.S. 1045, 118 S.Ct. 685, 139 L.Ed.2d 632 (1998). See also *Castle v. Sangamo Weston, Inc.*, 837 F.2d 1550, 1559 (11th Cir. 1988) ("Assessing the weight of the evidence and credibility of witnesses is reserved for the trier of fact."). Recently the Fifth Circuit keenly articulated the vital role of the jury in assessing the credibility of witnesses and evidence as follows:

> The jury, with its ability to listen to live testimony, [is] in a better position to judge the credibility of the witnesses and the accounts of the events; as such, we will not second guess their rejection of the defendants' proffered justification.

Russell v. McKinney Hospital Venture, ___ F.3d ___ (5th Cir. 2000), see also *Reeves*, at 2110.

GTE's defense in this matter centered almost solely around Tom Schaffer's testimony. During his testimony, it was obvious to the jury that Tom Schaffer was an interested party since he was the individual accused of illegal sex discrimination by Lee. Also, during Mr. Schaffer's testimony, the jury had the opportunity to observe his demeanor when answering questions. Lastly, the jury had the opportunity to compare Mr. Schaffer's testimony to the other evidence presented and determine where inconsistencies existed, particularly in his testimony regarding

the drafting of the Position Questionnaire and the Position Posting. Since the jury rendered a verdict in Lee's favor on her sex discrimination claim, it is obvious that the jury did not find Mr. Schaffer's testimony to be very credible. In *Combs*, the Eleventh Circuit stated that "a defendant cannot win judgment as a matter of law merely by proffering nothing but false nondiscriminatory reasons for its actions." *Combs* at 1537. However, from the recitation of facts set forth in its Opinion, it appears that the Eleventh Circuit has made its own evaluation of Mr. Schaffer's testimony and has given it great weight without regard to the contradictory evidence that was presented to the jury by Lee.

> Generally the employee has the burden of demonstrating that each proffered nondiscriminatory reason is pretextual. *Combs*, 106 F.3d 1519, 1539, 1543 (11th Cir. 1997), cert. denied, 522 U.S. 1045, 118 S.Ct. 685, 139 L.Ed.2d 632 (1988). However, when the plaintiff casts substantial doubt on many of the employer's multiple reasons, the jury could reasonably find the employer lacks credibility. *Chapman v. AI Transport*, 229 F.3d 1012, 1030 (11th Cir. 2000). Under those circumstances, the jury need not believe the employer's remaining reasons. "This is but common sense: if a person is shown to be a liar in an outrageous manner or is shown to have lied about a number of issues, the inference that the person is non-credible, and should not be believed as to other issues, is a reasonable one." *Id.* at 1050. Stated differently, "[t]here may be cases in which the multiple grounds offered by the defendant . . . are so intertwined, or the pretextual character of one of them so fishy and suspicious, that the plaintiff may [prevail]."

Wilson v. AM General Corp., 167 F.3d 1114, 1120 (7th Cir. 1999).

Tyler v. RE/MAX Mountain States, Inc., 232 F.3d 808, 814 (10th Cir. 2000)

In Footnote 2 of the Eleventh Circuit's Opinion (App. 12), the Eleventh Circuit discusses what it considers to be Lee's evidence demonstrating pretext. In its review of this evidence, the Eleventh Circuit wrongfully draws its own conclusions from some of the evidence presented by Lee:

> Lee also attempts to establish pretext by testifying that she was treated differently from Hines because Hines and Schaffer golfed together, and had once met privately for dinner in Tampa before the position was posted, to discuss Hines's interest in managing the real estate department. However, Shaffer [sic] did post the position, created a Position Questionnaire establishing objective criteria for the position, and interviewed a number of candidates, including Lee, before deciding on Hines. These actions rebut any reasonable inference of pretext that could otherwise be drawn from any relationship between Hines and Shaffer [sic].

The conclusion the Eleventh Circuit draws from this evidence clearly demonstrates that the Eleventh Circuit was impermissibly assessing and weighing the credibility of the evidence and precluding all other reasonable inferences that the jury could have drawn regarding this evidence other than its own. Further, the Eleventh Circuit went on to state:

> Lee also attempts to use as evidence of pretext the fact that Shaffer [sic] ultimately hired no women for the Real Estate Services position.

> However, this argument is wholly misleading, because Shaffer [sic] originally offered the Central Position to a woman, Janeen Travillyan, but she turned it down.

Once again, the Eleventh Circuit has impermissibly assessed and reweighed the credibility of this evidence and has chosen to completely disregard the contradictory evidence that Lee presented which showed that Janeen Travillyan, a resident of the Tampa, Florida area, only applied for the Manager, Real Estate Services East position, *not* the Central position which Mr. Schaffer claims he offered to her. By substituting its assessment of the credibility of this evidence, the Eleventh Circuit has impermissibly substituted its credibility assessment for that of the jury.

Finally, the Eleventh Circuit, apparently in an effort to justify reversing the District Court's denial of GTE's various motions for judgment as a matter of law, cites to a stray remark that the District Court Judge made during the trial that criticized Lee's evidence as being "paper thin." (App. 2). However, the Eleventh Circuit does not mention that in the Order denying GTE's Renewed Motion for Judgment as a Matter of Law, or in the Alternative, for New Trial (App. 17), the District Court Judge backed away from this stray remark and stated:

> While this court has criticized the Plaintiff's evidence as "paper thin," at this stage of the proceeding, it cannot conclude that no reasonable jury could have reached the verdict reached here on the claim of discrimination. Stated another way, the evidence here was not so one-sided that one party must prevail as a matter of law.

(App. 26). Since the District Court Judge observed the proceedings at trial, he also had the opportunity to observe the demeanor of the witnesses during their testimony, just as the jury had the opportunity to do. The District Court Judge's ability to observe the witnesses no doubt played a significant part in his decision to deny GTE's motions for judgment as a matter of law on four separate occasions.[5] The Eleventh Circuit, on the other hand, only viewed the witness testimony through the sterile lens of the trial transcript, where even the most incredible of witnesses can appear credible.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant certiorari to the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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[5] The District Court Judge denied GTE's oral Motion for a Directed Verdict at the close of Lee's case in chief; GTE's oral Motion for Judgment as a Matter of Law at the close of all the evidence at trial; GTE's Renewed Motion for Judgment as a Matter of Law, or in the Alternative, for New Trial (April 3, 1998); and GTE's Post-Judgment Motion for Judgment as a Matter of Law or, in the Alternative, for New Trial (September 3, 1998).

APPENDIX 1

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-3380

D. C. Docket No. 95-01544-CV-T-17(B)

ANDREA D. LEE,

Plaintiff-Appellee-
Cross-Appellant,

versus

GTE FLORIDA, INC.,

Defendant-Appellant-
Cross-Appellee.

Appeals from the United States District Court
for the Middle District of Florida

(Filed Sep. 13, 2000)

Before EDMONDSON and MARCUS, Circuit Judges, and HANCOCK*, District Judge.

PER CURIAM:

Defendant GTE Florida appeals from the district court's denial of its Rule 50(b) motion for judgment as a

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*Honorable James H. Hancock, U.S. District Judge for the Northern District of Alabama, sitting by designation.

matter of law as to Plaintiff Andrea Lee's Title VII sex discrimination claim. Lee cross-appeals the district court's reversal of the jury's punitive damages award and its award of only two years of front pay. Because the evidence Lee presented at trial to prove pretext was not legally sufficient to support a jury verdict in her favor, the district court erred in denying GTE's motion for judgment as a matter of law and we reverse. In light of this ruling, the cross appeal is moot.

I.

On September 18, 1995, Lee sued GTE alleging sex discrimination under Title VII and Florida law arising out of a failure to promote, retaliatory termination under Title VII and the ADEA, and a violation of ERISA. After the magistrate judge granted GTE's motion for partial summary judgment, Lee's only remaining cause of action was whether she was denied a promotion to the position of Manager-Real Estate Services because of her sex and/or age.

This matter was tried before a jury in December 1997. Immediately after Lee rested her case, GTE moved for judgment as a matter of law pursuant to Fed. R. Civ. Pro. 50(a). The court denied the motion. Thereafter, GTE rested without calling any witnesses, again renewing its Motion for Judgment as a Matter of Law. The court again denied the motion but observed that Lee's evidence was "paper thin." The jury returned a verdict finding intentional sex discrimination and awarded Lee back pay, including pension benefits and punitive damages. But the jury found for GTE on Lee's ADEA claim.

Soon thereafter, GTE renewed its Motion for Judgment as a Matter of Law or, in the Alternative, a New Trial, and on April 3, 1998, the court granted in part and denied in part the motion. The court upheld the jury's verdict on Lee's sex discrimination claim, as well as the award of back pay, including pension benefits. However, it reversed the jury's award of punitive damages. The court entered judgment for Lee in the amount of $216,000. Later, the court added an award for front pay, in the amount of $98,647, and for attorney's fees and costs in the amount of $100,000. The total amount awarded to Lee was $414,647.

II.

The facts of this case are straightforward. Andrea Lee was first hired by GTE as an operator in Tampa, Florida, in June 1970. In December 1970 she was promoted to a facilities clerk position, and in December 1972 she was again promoted to an engineer position in GTE's Real Estate Division in Tampa. Lee's engineering position carried a salary level of "4." In January 1980 Lee was promoted to a senior engineering position in GTE's Real Estate Services at a salary level of "5." Lee held this position until November 6, 1994, when her job was eliminated as a result of a reduction in force.

In the early 1990s GTE implemented a reduction in force plan called Process Reengineering. As a result of the reengineering, many positions were either eliminated or consolidated into other positions. Lee's position of Engineer-Real Estate was eliminated and six other individuals

who held the same position in other parts of the country also lost their jobs.

As part of the company reorganization, Tom Shaffer, a member of the Process Reengineering task force, created three new positions with the title of Manager-Real Estate Services. Shaffer divided the country into three equal zones, making one position responsible for the Western U.S., the second position responsible for the Central U.S., and the third position, located in Tampa, responsible for the Eastern U.S.

Employees whose jobs were to be eliminated because of the reengineering process were given an opportunity to apply for other positions within GTE. In March 1994, Lee applied for the Manager-Real Estate Services position that was responsible for the Eastern U.S.[1] In order to fill the Manager-Real Estate Services positions, Shaffer created a Position Questionnaire. The Questionnaire described the experience and qualifications relevant for the position, in descending order of importance: 1) managerial experience; 2) strategic planning experience; 3) a Bachelor's degree in business or engineering; and 4) commercial real estate experience.

Shaffer interviewed Andrea Lee, along with several other candidates, for the Manager-Real Estate Services East position. During Lee's interview, Shaffer told her not to discuss her background and qualifications because he already knew them. According to Lee, Shaffer also

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[1] Lee indicated she was not willing to move from Tampa, and therefore applied only for the Manager-Real Estate Services East position.

expressed concern about any employee making a salary level jump from a level "5" (the level which Lee held) to a level "9" (the new level established for the Manager-Real Estate position). Shaffer said that he had never promoted anyone four salary levels at one time and that he had never promoted someone to a level "9" position with no supervisory experience. Shaffer also told Lee that her real estate experience was a low priority to him since that function was going to be outsourced.

Neither Lee nor her immediate supervisor, Bob Atteberry, who also applied for the position, were selected for the position. Shaffer testified that he ultimately chose Colin Hines because Shaffer believed Hines was more qualified than Lee (and the other candidates).

After Lee was informed that she was not selected for the new position, she complained to Nancy Dinkel, a GTE Employee Relations Manager. GTE commenced an internal investigation, but concluded that there had been no discrimination in the selection process.

As part of the investigatory process, Shaffer was requested to write a letter summarizing the reasons why he selected Hines over Lee. In his letter, Shaffer stated that he chose Hines over Lee because he felt that Hines's background, experience, knowledge, and education gave him an advantage over Lee based on four primary criteria: strategic planning, proven managerial ability, education, and real estate experience. Shaffer acknowledged that Lee had more real estate experience, but opined that Hines possessed stronger qualifications in the three other areas. Shaffer wrote that Hines held a Bachelor's degree,

a GTE Associate Technical degree, and an Associate Management degree, while Lee only held a high school degree.

At trial, Lee called numerous witnesses, all of whom testified that she was extremely competent in real estate transactions. None of these witnesses testified that they ever heard Shaffer act or speak in a discriminatory manner.

III.

We review the district court's denial of defendant's motion for judgment as a matter of law de novo, applying the same standards used by the district court. *See Tidwell v. Carter Prods.*, 135 F.3d 1422, 1425 (11th Cir. 1998). "Those standards require the consideration of 'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.' " *Id.* (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52, 106 S.Ct. 2505, 2512, 91 L.Ed.2d 202 (1986)).

To establish a prima facie case of Title VII sex discrimination in a promotional decision, a plaintiff must prove: (1) that she is a member of a protected minority; (2) that she was qualified and applied for the promotion; (3) that she was rejected despite these qualifications; and (4) other equally or less qualified employees who are not members of the protected minority were promoted. *See Taylor v. Runyon*, 175 F.3d 861, 866 (11th Cir. 1999). Once the plaintiff has established a prima facie case of discrimination, the burden shifts to the employer to articulate some legitimate, nondiscriminatory reason for the

employee's rejection. *See id.* If the employer meets this burden of production, the plaintiff must then establish that the defendant's proffered reasons for the employee's rejection were pretextual. *See id.* at 867.

In a failure to promote case, a plaintiff cannot prove pretext by simply showing that she was better qualified than the individual who received the position that she wanted. A plaintiff must show not merely that the defendant's employment decisions were mistaken but that they were in fact motivated by sex. *See Alexander v. Fulton County*, 207 F.3d 1303, 1339 (11th Cir. 2000). We have explained that "a plaintiff may not establish that an employer's proffered reason is pretextual merely by questioning the wisdom of the employer's reasons, at least not where . . . the reason is one that might motivate a reasonable employer." *Combs v. Plantation Patterns*, 106 F.3d 1519, 1543 (11th Cir. 1997), *cert. denied, sub nom., Combs v. Meadowcraft Co.*, 522 U.S. 1045, 118 S. Ct. 685, 139 L. Ed. 2d 632 (1998); *see also Damon v. Fleming Supermarkets of Florida, Inc.*, 196 F.3d 1354, 1361 (11th Cir. 1999), *cert. denied*, ___ U.S. ___, 120 S. Ct. 1962, 146 L.Ed.2d 793 (2000) (emphasizing that courts "are not in the business of adjudging whether employment decisions are prudent or fair. Instead our sole concern is whether unlawful discriminatory animus motivates a challenged employment decision."); *Deines v. Texas Dept. of Protective and Regulatory Servs.*, 164 F.3d 277, 281 (5th Cir. 1999) (explaining that "it is not the function of the jury to scrutinize the employer's judgment as to who is best qualified to fill the position. . . . The single issue for the trier of fact is whether the employer's selection of a particular applicant over the plaintiff was motivated by discrimination.")

Nevertheless, evidence showing an employer hired a less qualified applicant over the plaintiff may be probative of whether the employer's proffered reason for not promoting the plaintiff was pretextual. *See Alexander,* 207 F.3d at 1340; *see also Walker v. Mortham,* 158 F.3d 1177, 1190 (11th Cir. 1998), *cert. denied,* ___ U.S. ___, 120 S.Ct. 39, 145 L. Ed. 2d 36 (1999) (" 'The fact that a court may think that the employer misjudged the qualifications of the applicants does not in itself expose him to Title VII liability, although this may be probative of whether the employer's reasons are pretexts for discrimination' ") (quoting *Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248, 258-59, 101 S.Ct. 1089, 1096-97, 67 L.Ed.2d 207 (1981)); *see also Taylor,* 175 F.3d at 868 (stating that evidence of plaintiff's superior experience "would permit a jury to disbelieve" that the employer actually relied on the chosen candidate's experience when it promoted him).

Other circuits have more clearly articulated the evidentiary burden a plaintiff must meet in order to prove pretext by showing she was substantially more qualified than the person promoted. *See Fulton County,* 207 F.3d at 1340. In Deines, for example, the Fifth Circuit affirmed the district court's instruction to the jury stating that "disparities in qualifications are not enough in and of themselves to demonstrate discriminatory intent unless those disparities are so apparent as virtually to jump off the page and slap you in the face." 164 F.3d at 280. The court explained that the phrase

> "jump off the page and slap [you] in the face" . . . should be understood to mean that disparities in qualifications must be of such weight

> and significance that no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff for the job in question. This evidentiary standard does not alter the plaintiff's evidentiary burden to prove the fact of intentional discrimination by a preponderance of the evidence. Instead, the standard only describes the character of this particular type of evidence that will be probative of that ultimate fact.

Id. at 280-81.

The Tenth Circuit in *Simms v. Oklahoma ex rel. Department of Mental Health and Substance Abuse Services*, 165 F.3d 1321 (10th Cir.), *cert. denied*, ___ U.S. ___, 120 S.Ct. 53, 145 L. Ed.2d 46 (1999), articulated a similar evidentiary burden for proving pretext. The court explained that "an employee's own opinions about his . . . qualifications [do not] give rise to a material factual dispute. . . . When two candidates are equally qualified in that they both possess the objective qualifications for the position and neither is clearly better qualified, it is within the employer's discretion to choose among them so long as the decision is not based on unlawful criteria." *Id.* at 1329-30 (internal quotations and citations omitted). The court emphasized that its "role is to prevent unlawful hiring practices, not to act as a 'super personnel department' that second-guesses employers' business judgments." *Id.* at 1330.

Shaffer testified that he hired Hines instead of the plaintiff Lee because, in his judgment, Hines was better qualified with respect to three of the four criteria listed in the Position Questionnaire. According to Shaffer, Hines had more managerial experience, more strategic planning

experience, and had a Bachelor's degree in Building Construction from Virginia Polytechnic Institute, the equivalent of an Engineering degree.

Indeed, the evidence is undisputed that Hines had strong managerial skills, that he had direct supervisory responsibility for over 25 employees since 1982, that his experience included the supervision of three safety administrators and one clerk in his Loss Prevention Management position, and that he had occasion to manage six planners, a secretary, and a contract drafter when he held the position of Section Manager-Exchange Planning. In contrast, Lee never managed any GTE management level employees.

Moreover, the evidence is likewise undisputed that Hines had substantial experience in strategic planning dating back to 1978, when he became a Senior Outside Plant Engineer. In Hines's last position prior to his selection for the Manager-Real Estate Services position, he was responsible for the planning efforts in coastal Florida for a telephone switching network valued at more than $500 million.

As for the third qualification identified by Shaffer in the job description – a preference for someone with a Bachelor's degree in business or engineering – it is undisputed that Hines had a bachelor's degree, whereas Lee

finished two years of school at Hillsborough Community College obtaining an equivalent to an Associate of Arts degree in real estate.

Lee argues, nevertheless, that Shaffer's stated reason for denying her the promotion was pretextual because in her opinion she was more qualified than Hines. On this record, however, the evidence is insufficient to raise a genuine issue of fact regarding whether GTE's stated reason for promoting Hines instead of her is pretextual. *None* of Lee's proffered evidence established that she was more qualified than Hines, let alone so clearly more qualified for the position than Hines that a reasonable juror could infer discriminatory intent from the comparison. *See Fulton County*, 207 F.3d at 1340; *Deines*, 164 F.3d at 280-81; *Simms*, 165 F.3d at 1329-30. Indeed, the evidence establishes that, of the four stated criteria in the position questionnaire, Lee was clearly more qualified that [sic] Hines in only one – that of commercial real estate experience. Further, GTE never disputed that Lee had more real estate experience than Hines, but said that real estate experience was the least important of the four criteria because the real estate function of the position had been outsourced. As for the first two criteria in the position questionnaire – managerial skills and strategic planning experience – the evidence established at most that the candidates were equally qualified. As for the preference for a Bachelor's degree, Hines was decidedly more qualified than Lee.

Quite simply, this evidence does not rise to the level of proof that is required when an employee attempts to prove pretext by showing she was substantially more qualified than the person promoted. Since Lee's evidence

at trial fell far short of establishing that she was clearly more qualified for the position than Hines, Lee did not meet her burden of establishing that Shaffer's proffered reason for denying her the promotion was a pretext for gender discrimination.[2]

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[2] Lee also argues that several other pieces of evidence support her position. First, Lee points to the fact that Shaffer, in his letter in response to the GTE investigation, changed the importance of the criteria he used in the selection process so that strategic planning became the most important of the four criteria. Lee claims that this shift in priorities was made after Shaffer hired Hines, to more closely tailor the criteria to Hines's qualifications. This evidence is not, however, significantly probative of pretext. *See Nichols v. Lewis Grocer*, 138 F.3d 563, 568 (5th Cir. 1998) (finding unpersuasive plaintiff's argument that the fact that the employer had changed the importance of the criteria used in the selection process established pretext, because "[t]he promotion decision is a dynamic one, and the relative importance placed on various selection criteria cannot be expected to remain fixed and unyielding.")

In addition, Lee claims that Shaffer's letter is evidence of pretext because in it "Shaffer played up Hines's qualifications, experience, and background while at the same time he down played Lee's qualifications, experience, and background." However, while Lee may have believed that Shaffer was mistaken in not giving greater weight to her educational experience, we have held that "a plaintiff may not establish that an employer's proffered reason is pretextual merely by questioning the wisdom of the employer's reason. . . . " *Combs*, 106 F.3d at 1543.

Next, Lee claims that the fact that she was treated differently from the other applicants during her interview is proof of pretext. Specifically, she testified that she was treated differently because she was not allowed to discuss her background and qualifications during the interview whereas the other applicants were allowed to do so. However, Lee conceded that Shaffer already knew her background and

Lee did not present sufficient evidence at trial to support the jury's finding that Shaffer's proffered reason

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qualifications, a fact that undercuts any reasonable inference of pretext.

Lee also attempts to establish pretext by testifying that she was treated differently from Hines because Hines and Shaffer golfed together, and had once met privately for dinner in Tampa before the position was posted, to discuss Hines's interest in managing the real estate department. However, Shaffer did post the position, created a Position Questionnaire establishing objective criteria for the position, and interviewed a number of candidates, including Lee, before deciding on Hines. These actions rebut any reasonable inference of pretext that could otherwise be drawn from any relationship between Hines and Shaffer.

Lee also relies on the fact that Shaffer expressed concern during her interview about promoting an employee four management pay levels as evidence of pretext. Lee claims that since she had previously been promoted four pay levels, Shaffer's statement that he had never promoted anyone four pay levels indicated pretext. Lee mischaracterizes Shaffer's testimony. First, in the promotion where Lee was promoted four pay levels, she was not promoted four *management* pay levels, as would have been the case if she was promoted to the Manager-Real Estate Services position. Second, Shaffer testified only that it would be rare for someone to be promoted four management pay levels, and that he, personally, had never done it, a point in no way rebutted by Lee.

Finally, Lee attempts to show pretext by arguing that Shaffer had a poor history of promoting women, and, more specifically, that he did not offer a single Real Estate Services position (of the four total) to a female. Neither of these claims, however, is sufficient to raise a genuine issue regarding pretext. First, Lee's claim that Shaffer had a poor history of promoting women is too generalized to have any statistical significance. She claims that Shaffer only promoted a total of four women into management positions and only hired two women into staff

for denying her the promotion was a pretext for sex discrimination. Accordingly, we REVERSE the court's denial of GTE's motion for judgment as a matter of law, and remand for the district court to enter judgment in GTE's favor.

REVERSED AND REMANDED.

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positions. Notably, however, Lee does not tell us how many people Shaffer promoted in total and she provides no evidence as to relative qualifications. Lee also claims that although "the applicant list" for the seven management positions that Shaffer had to fill when he reorganized the company contained "a significant number of females," Shaffer filled all seven spots with men. Again, this data is statistically meaningless, because Lee has provided no specific context against which to measure these brief facts.

Lee also attempts to use as evidence of pretext the fact that Shaffer ultimately hired no women for the Real Estate Services position. However, this argument is wholly misleading, because Shaffer originally offered the Central Position to a woman, Janeen Travillyan, but she turned it down.

APPENDIX 2

United States Court of Appeals
For the Eleventh Circuit

No. 98-3380

District Court Docket No. 95-01544-CV

ANDREA D. LEE,

Plaintiff-Appellee-
Cross-Appellant,

versus

GTE FLORIDA, INC.,

Defendant-Appellant-
Cross-Appellee.

Appeals from the United States District Court
for the Middle District of Florida

Before EDMONDSON and MARCUS, Circuit Judges, and HANCOCK*, District Judge.

JUDGMENT

(Filed Sept. 13, 2000)

These causes came to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and were argued by counsel;

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* Honorable James H. Hancock, U.S. District Judge for the Northern District of Alabama, sitting by designation.

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the order of the said District Court in these causes be and the same is hereby REVERSED; and this cause be and the same is hereby REMANDED to said District Court to enter judgment in GTE's favor in accordance with the opinion of this Court;

IT IS FURTHER ORDER [sic] ORDERED THAT plaintiff-appellee-cross-appellant pay to defendant-appellant-cross-appellee, the costs on appeal to be taxed in accordance with Fed.R.App.P. 39.

Entered: September 13, 2000
For the Court: Thomas K. Kahn, Clerk

By /s/ Matt Davidson
Deputy Clerk

ISSUED AS MANDATE: NOV 30 2000

APPENDIX 3

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

ANDREA D. LEE,

Plaintiff,

v. **CASE NO. 95-1544-CIV-T-17E**

GTE, FLORIDA INCORPORATED,

Defendant.

_____ /

ORDER

THIS MATTER is before the court on **Defendant's Renewed Motion for Judgment as a Matter of Law or, in the Alternative, for New Trial.** (Doc. 80). Plaintiff has filed its response in opposition. (Doc. 84).

I.

Andrea D. Lee (hereinafter "Lee") is a former employee of GTE Florida, Incorporated (hereinafter "GTE"). After failing to be hired to a new position and then losing her job in a "reduction in force" in November 1994, Lee filed suit against GTE alleging gender and age discrimination under Title VII. This cause was tried before a jury, December 1, 1997, through December 8, 1997. The jury found in favor of Ms. Lee on her claim for gender discrimination and awarded $216,000 for back pay, including pension. Additionally, the jury awarded

$250,000 in punitive damages. The jury returned a verdict in favor of GTE on the age discrimination claim.

By its motion, GTE seeks a judgment as a matter of law as to Plaintiffs claim for gender discrimination, or alternatively, a new trial on this claim. Additionally, GTE seeks a judgment as a matter of law on the award of punitive damages. Because the court reaches different conclusions on the award of back pay versus the award of punitive damages, each aspect of the motion is discussed separately.

II.

Federal Rule of Civil Procedure 50 provides that a trial court may consider a renewed motion for judgment after trial. In such circumstances, the court may, if a verdict is returned, allow the judgment to stand, order a new trial, or direct entry of a judgment as a matter of law. Fed. R. Civ. P. 50. In addressing such motions (formerly called "motions for judgment notwithstanding the verdict"), the Eleventh Circuit has stated:

> On motions . . . for judgment notwithstanding the verdict the Court should consider all of the evidence-not just that evidence which supports the non-mover's case-but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motion is proper. On the other hand, if there is substantial

> evidence opposed to the motions, that is evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motion should be denied. . . .

Rabun v. Kimberly-Clark Corp., 678 F.2d 1053, 1057 (11th Cir. 1982) (citations omitted). The Eleventh Circuit has also stated that a jury question is not created because of the presence of a scintilla of evidence, instead there must be a conflict in substantial evidence to create the jury question. *Walker v. Nationsbank of Florida N.A.*, 53 F.3d 1548, 1555 (11th Cir. 1995) (citing *Verbraeken v. Westinghouse Electric Corp.*, 881 F.2d 1041, 1045 (11th Cir. 1989)). Thus, this court "must consider all the evidence in the light most favorable to [Lee] and determine 'whether or not reasonable jurors could have concluded as this jury did based on the evidence presented.' " *Combs v. Plantation Patterns*, 106 F.3d 1519, 1526 (11th Cir. 1997) (citing *Quick v. Peoples Bank*, 993 F.2d 793, 797 (11th Cir. 1993)).

In the instant case, the Plaintiff sought to prove her allegations of discrimination through circumstantial evidence, relying on the *McDonnell Douglas* model of proof. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Under this model of proof, a plaintiff has the initial burden of establishing a prima facie case. Such prima facie case establishes a presumption of unlawful discrimination. On the basis of such presumption, the burden of persuasion shifts to the employer to establish legitimate non-discriminatory reasons for the employment action. To meet this burden, the employer must produce evidence which would allow the trier of fact to conclude rationally that the employment decision was not based

upon discrimination. If the employer carries its burden, the presumption of discrimination is eliminated and the burden falls to the plaintiff to establish that the employer's proffered explanation for its employment action is unworthy of belief. A plaintiff may prevail in this either "directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981). In the instant litigation, plaintiff Lee sought to establish indirectly that the proffered reasons were pretextual.

III.

By this motion, GTE again asserts that Plaintiff failed to establish a prima facie case. Once again, this court disagrees and finds it unnecessary to discuss the matter at length. Additionally, however, GTE argues that the Plaintiff has not shown its articulated non-discriminatory reasons for selecting a male candidate, Colin Hines (hereinafter "Hines"), to the newly created position of Real Estate Manager-East as a pretext to discrimination.

In *Combs v. Plantation Patterns*, 106 F.3d 1519 (11th Cir. 1997), the Eleventh Circuit addressed the appropriate procedure for handling a Rule 50 motion in a similar set of circumstances. The court stated:

> When deciding a motion by the defendant for judgment as a matter of law in a discrimination case in which the defendant has proffered non-discriminatory reasons for its actions, the district court's task is a highly focused one. The district court must, in view of all the evidence,

> determine whether the plaintiff has cast sufficient doubt on the defendant's proffered nondiscriminatory reasons to permit a reasonable factfinder to conclude that the employer's proffered 'legitimate reasons were not what actually motivated its conduct.' The district court must evaluate whether the plaintiff has demonstrated 'such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could find them unworthy of credence.'

Id. at 1538 (citations omitted).

The analysis turns on the evidence introduced at trial. Lee was an employee of GTE for twenty-four years. For twenty-two years, she worked in the real estate department. The evidence reveals that she was highly competent and experienced in all aspects of GTE's real estate functions. As a result of a process re-engineering, the decision was made to abolish GTE's real estate department. The functions of the department were to be turned over to an outsource broker. These outsource brokers would be managed by GTE personnel in a new position to be known as "Real Estate Manager." The country was divided into three divisions, East, Central, and West, and one Real Estate Manager was selected for each division. When the position was posted, Lee applied for the Real Estate Manager-East position. The hiring decision was made by Thomas Schaffer (hereinafter "Schaffer"). Plaintiffs Exhibits 21 and 22 outline Schaffer's original concept for the responsibilities and requirements of this position. These documents were created early in 1994. After Schaffer awarded the position to

Colin Hines, Lee complained of discrimination. As a result of an internal investigation by GTE, Schaffer responded, in writing, on September 28, 1994, to Linda Thrapp, a human resources employee of GTE. (*See* Pl. Exh. 30). This document purports to be a summary of Schaffer's reasons for hiring Hines over Lee.

According to Schaffer, Hines was hired for the position of Real Estate Manager-East because he was the most qualified candidate. As his qualifications were compared to Lee's, he was said to be more qualified in three of the four primary qualification areas. According to Exhibit 30, the hiring decision was based on four primary criteria: (1) strategic planning expertise; (2) proven managerial ability; (3) bachelor's degree in business or engineering; and (4) commercial real estate experience. According to Schaffer, under these criteria, Hines had the greater strategic planning experience and had a broader range of proven managerial ability. By Schaffer's explanation, Hines possessed greater educational background, including a bachelor of science degree and certain degrees offered by GTE, while Lee only possessed a high school diploma. Schaffer's explanation conceded that both candidates satisfied the last criteria of the commercial real estate criteria.

At trial, Schaffer testified that these four criteria were the primary criteria despite what may have been indicated in the job postings. Again, he testified that Lee possessed the greater commercial real estate experience, but was otherwise less qualified than Hines in the other critical areas. Schaffer did acknowledge that Lee had education beyond that of a high school diploma, although it was generally limited to the area of real estate. He

acknowledged that Hines's degree was neither in business nor engineering. At trial, Schaffer testified that proven managerial ability and strategic planning expertise were the two most important criteria. Under these criteria, Schaffer testified that Hines's broader range of experience as a manager, including experience in strategic planning, gave him the nod over Lee. Additionally, at trial, Schaffer testified that he had concerns about promoting an individual such as Lee, who was at a level five, to a position at level nine, where such person lacked supervisory experience. He also testified that after his interview of Lee, he was concerned with Lee's thoughts regarding the outsourcing plan envisioned by the process re-engineering. Schaffer denied that Lee's gender had anything to do with this decision and testified to having hired other females and offering a female one of these new positions.

To prove both her prima facie case and that the proffered reasons were pretextual, Plaintiff primarily sought to prove that she was a highly competent female employee who had done an outstanding job in every aspect of work in the real estate department of GTE. She established that her responsibilities included management of assets, leases, and so on, and that the jobs involved some degree of strategic planning. She further established an educational background which included many courses beyond high school, but she conceded she has no college degree. In a light most favorable to Lee, she established that her experience in all aspects of real estate management was extensive, that her performance in all aspects of her job was exemplary, that she had proven managerial ability, some strategic planning and

post-high school education. Using the original job posting as the true indicator of the hiring criteria, Lee could claim to be equally qualified, or more qualified than Hines.

According to Plaintiff's version of the events, Schaffer's letter of explanation was a pretext, intended to contour his hiring decision to fit Hines's qualifications. Counsel also confronted Schaffer's hiring history to suggest that he mostly hired male individuals. Additionally, counsel argued that the evidence showed that Plaintiff's interview with Schaffer was something of a sham in relation to the interview afforded to Hines. Evidence did establish that Hines had met with Schaffer earlier in the hiring process to discuss the new position and his availability for it, that he and Schaffer had played golf together on one occasion, and that the interview with Hines had been longer in duration.

The decision in *Combs v. Plantation Patterns* counsels this court to focus on the Plaintiff's evidence and whether or not it cast doubt on the Defendant's proffered nondiscriminatory reasons such that a reasonable fact finder could conclude under the evidence that the employer's reasons were pretextual. To defeat a motion seeking judgment as a matter of law, a plaintiff must establish a prima facie case and produce evidence "sufficient to discredit in the mind of a reasonable juror all of the defendant's proffered nondiscriminatory reasons for its actions." *Combs* 106 F.3d at 1543. After carefully considering the entire record, in a light favorable to Lee, this court concludes that there is minimally sufficient evidence to call into question Defendant's proffered nondiscriminatory reasons for its employment decision in this case.

Given the evidence adduced at this trial, a reasonable jury could also conclude that indeed Lee was the more qualified individual to handle the principal responsibilities of the newly created position as it was originally posted. Lee possessed vastly greater experience in the real estate area and, as outlined in the earlier job positing, the ability to manage the real estate needs of GTE was the primary responsibility of the position. A reasonable jury could conclude that significant differences existed between the criteria set out in the original job questionnaire and job posting created prior to the hiring decision and the criteria listed in the letter of explanation given by Schaffer subsequent to the allegation of discrimination. Thus, the veracity of the hiring explanation in its entirety is called into question. Thus, using the job posting as a guide to the actual qualifications necessary for the position, a reasonable jury could find that a less qualified male was hired and that GTE's subsequent explanation, as embodied in the September 28, 1994 letter of explanation, was a pretext.

On the issue of pretext, Plaintiff established at least a shift in emphasis, if not outright inconsistencies in the hiring criteria. For example, the original job posting indicated that three years experience in commercial real estate, GTE real estate standards, environmental and strategic planning was "beneficial." It also indicated a bachelor's degree in business or engineering was "desirable." (*See* Pl.'s Exh. 22). However, in order to justify his hiring decision, Schaffer wrote (and testified at trial) that strategic planning and a college degree were primary criteria and required. Lee could justifiably argue that Schaffer

altered the criteria of the position to fit Hines's qualifications. Further, she could argue that there was a shift in emphasis on the matter of proven managerial ability. The original job questionnaire and posting gave significant emphasis to management of the real estate functions of the company. Later, Schaffer said he meant a broad range of management experience separate and apart from experience with GTE's real estate business.

While reasonable jurors could reach different conclusions from this type evidence, this court cannot say that no reasonable jury could find that the letter of explanation was of questionable veracity and did not accurately reflect the actual hiring criteria. In viewing the record in the light most favorable to Lee, the court has to conclude that a reasonable jury could find that the criteria relied upon in September 1994 to justify the hiring decision were different than those actually relied upon in the decision process and that the differences could reasonably justify a finding of pretext.

Case law recognizes that evidence of discrimination may be very subtle. The *McDonnell Douglas* model of proof acknowledges this fact. Here, Plaintiff's prima facie case, coupled with her circumstantial evidence suggesting that GTE's "qualifications" explanation was false, allow her to survive the motion for judgment as a matter of law. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993); *Combs v. Plantation Patterns*, 106 F.3d at 1529.

While this court has criticized the Plaintiff's evidence as "paper thin," at this stage of the proceeding, it cannot conclude that no reasonable jury could have reached the verdict reached here on the claim of discrimination.

Stated another way, the evidence here was not so one-sided that one party must prevail as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251 (1986). The jury's award of back pay, including pension, is **CONFIRMED** by this court and to this extent, the Defendant's Motion is **DENIED**.

IV.

Defendant also seeks a judgment as a matter of law on the award of punitive damages. In a Title VII case, the plaintiff may seek an award of punitive damages. 42 U.S.C. § 1981a(b)(1). ("A complaining party may recover punitive damages . . . if the complaining party demonstrates that the respondent engaged in a discriminatory practice . . . with malice or reckless indifference to the federally protected rights of an aggrieved individual."). While GTE does not dispute this right, it argues that the evidence cannot support such a claim in this case.

In this circuit, punitive damages are appropriate where an "employer acted with 'malice or reckless indifference to [her] federally protected rights.' " *Reynolds v. CSX Transp., Inc.*, 115 F.3d 860, 869 (11th Cir. 1997). In this context, "malice" means "an intent to harm" and "recklessness" means "serious disregard for the consequences of [one's] actions." *Id.* (citing *Splunge v. Shoney's, Inc.*, 97 F.3d 488, 491 (11th Cir. 1996)). Where there is no showing that "higher management," countenanced or approved the supervisor's behavior, there can be no award of punitive damages. *Id.* at 491 (citing *Patterson v. P.H.P. Healthcare Corp.*, 90 F.3d 927, 943 (5th Cir. 1996)).

Here, GTE had a published policy against discrimination and conducted its own investigation of the matter in an apparently unbiased, non-retaliatory manner. There is no evidence that it knowingly countenanced any discrimination or intentional or reckless harm to the Plaintiff. Even Schaffer's acts were not egregious. As noted above, Lee survives this motion, in part, because a jury could conclude she established a prima facie case and Schaffer's proffered reasons were untrue. Such scenario allows for a finding of discrimination under the *McDonnell Douglas* model of proof, but in this case, is wholly insufficient to support an award of punitive damages. This court believes that this conclusion is bolstered by the refusal of the jury to award Lee any sum for emotional distress. In the face of such finding, it is impossible to conclude that the company, or its supervisor, acted with the necessary intent to harm or with the requisite reckless indifference to Lee's rights.

Here, because the evidence is so one-sided on this issue, GTE must prevail as a matter of law.

V.

Accordingly, **Defendant's Renewed Motion for Judgment as a Matter of Law or, in the Alternative, for New Trial** (Doc. 80) is **GRANTED** in part and **DENIED** in part, as set out herein. The clerk shall enter judgment in accordance with the jury verdict and this Order, reserving and retaining jurisdiction on the matter of front pay or other equitable relief, fees, costs, and interest. By separate notice, the court will calendar the dispute over Lee's claim of front pay for a hearing. Prior to the hearing,

counsel are **ORDERED** to confer on the front pay issue and to narrow the factual issues to the greatest extent possible.

Done and Ordered at Tampa, Florida, this 3rd day of April, 1998.

/s/ Thomas B. McCoun
THOMAS B. MCCOUN III
UNITED STATES
DISTRICT JUDGE

Copies furnished to:
Counsel of Record

APPENDIX 4

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

ANDREA D. LEE,

Plaintiff,

v.

CASE NO.
95-1544-CIV-T-17E

GTE, FLORIDA INCORPORATED,

Defendant.

_____/

ORDER

THIS MATTER is before the court on **Plaintiff's Motion for Reinstatement or in the Alternative, Motion for Award of Front Pay Damages, and Supporting Memorandum of Law.** (Doc. 83). The Defendant has filed its response in opposition. (Doc. 85). Arguments were conducted on the motion May 1, 1998.

On December 8, 1997, the jury returned a verdict in favor of Ms. Lee, finding that GTE Florida, Incorporated (hereinafter "GTE") intentionally discriminated against her by reason of her sex. The jury awarded $216,000 for back pay, including pension. This award was calculated by an economist and assumed that Ms. Lee would have remained employed at GTE at least through July 8, 1998, the date she became fully vested in her pension. An award of punitive damages was additionally awarded by the jury; however, this award has been set aside by the court. By the instant pleading, Plaintiff seeks front pay

for a term of seven years or until her age of fifty-five.[1] Specifically, Plaintiff seeks $35,690 in future bonuses, together with an additional $133,345 in pension benefits, plus $3,500 in insurance premium costs, and an additional $46,000 in monies to cover the cost of replacement for health insurance through her twenty-three year life expectancy.[2]

In opposition, GTE contends that the Plaintiff has already obtained a measure of front pay damages by reason of the formula used to calculate her past losses. It urges that she should receive nothing further in front pay. Alternatively, it urges that the court grant front pay only for a limited term and not the full seven-year term suggested by Plaintiff.

The evidence in this case clearly proved that Ms. Lee was a loyal, diligent, and competent employee of GTE for over twenty years, all of the evidence indicated she was a career employee at GTE and would have continued to work there at least to the point when she was vested in her pension. At trial, Plaintiff's economist assumed this to be so and made her calculations on this basis. In the court's view, this formula was supportable and obviously the jury agreed in substantial part. The same evidence

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[1] At age fifty-five, Plaintiff would be eligible to receive the fill amount of pension. As the court understands this plan, there is a 3% penalty for each year prior to age 55 at which an employee retires.

[2] Although the motion seeks the alternative relief of reinstatement, the parties have agreed at oral argument that reinstatement is inappropriate in the instant case and that the focus is now solely upon the matter of front pay.

supports that because of her relative youth, it is likely that Ms. Lee would have stayed for some period of time beyond the date she became vested if there had been a job available to her. This extended service would have enhanced the nature of her pension, allowed for annual bonuses, and paid for her health benefits in addition to providing her with an excellent salary. Although Ms. Lee's competence has allowed her to quickly reach a point of comparability with regards to her annual salary, she is not made whole by reason of her employment subsequent to GTE. For these reasons and given the principle that Title VII is not only intended to assure equality in the workplace, but also to make persons whole for injuries suffered by reason of employment discrimination, *see Albemarle Paper Co.*, 422 U.S. 405 (1975), this court finds that some award of front pay is appropriate.

This conclusion is supported by the case law. Where reinstatement is inappropriate, courts have awarded front pay as an alternative. *See Nord v. United States Steel Corp.*, 758 F.2d 1462, 1473 (11th Cir. 1985) (citing *James v. Stockham Valves and Fittings Co.*, 559 F.2d 310, 358 (5th Cir. 1977); *Thompson v. Sawyer*, 678 F.2d 257, 292 (D.C. Cir. 1982); *Fitzgerald v. Sirloin Stockade, Inc.*, 624 F.2d 945 (10th Cir. 1980). An award of front pay lies in the broad discretion of the court to fashion complete relief under Title VII. *See Virgo v. Riviera Beach Assoc.*, 30 F.3d 1350, 1363 (11th Cir. 1994).

Considerations of the appropriateness, as well as the amount, of such an award in this case must be tempered by the fact that this was not a termination case. Ms. Lee ultimately lost her job in a planned reduction in force. Earlier in the proceedings, this court concluded that this

reduction in force was gender and age neutral. Further, Ms. Lee was not so close to the age when her retirement benefits would be maximized that it is appropriate to draw negative inferences against the company. Front pay for seven years, in these circumstances, is unsupportable and the court declines to run her front pay through to her age fifty-five.

This court recognizes that selection of any term of front pay involves some degree of uncertainty, if not speculation. *See Castle v. Sangamo Weston, Inc.*, 837 F.2d 1550, 1562 (11th Cir. 1988). The longer the front pay period is, the more speculative the award. *See Hybert v. The Hearst Corp.*, 900 F.2d 1050, 1056 (7th Cir. 1990) (quoting *Rengers v. WCLR Radio Station*, 661 F. Supp. 649, 650-51 (N.D. Ill. 1986)). The Defendant's survey of the case law suggests that front pay determinations are made on a case-by-case basis. *See e.g., Hybert*, 900 F.2d at 1056-57 (finding that a front pay award based on five years "impermissibly speculative," in light of the large amount of the award "covering such an extended length of time"); *Cowan v. Strafford R-VI School District*, Case Nos. 96-4010, 97-1131, 97-1132, 1998 WL 156405, at *6 (8th Cir. 1998) (concluding that the trial court correctly determined that two years front pay was the appropriate award in that case); *Goss v. Exxon Office Sys. Co.*, 747 F.2d 885, 890-91 (3d Cir. 1984) (affirming the trial court's limitation of front pay to four months).

While it is too speculative to conclude that Ms. Lee would have remained employed by GTE through the year 2005, it is not speculative to conclude that her employment may well have lasted beyond even the date upon which she became vested. Under the GTE pension plan,

early retirement invokes a significant annual penalty or reduction in the amount of pension. Given Ms. Lee's work history and apparent strong work ethic, her longevity and high level of performance and her satisfaction with her job, I conclude that it is likely that she would have sought to increase her pension benefits and continue to enjoy her salary and health benefits for some additional period of time. GTE suggests that at the most, this term is two years. The court agrees. Upon consideration of all the circumstances, this court concludes that front pay through 50 years of age is not inappropriate. Such additional monies should be sufficient, if properly placed, to make the Plaintiff whole for her losses. Thus, Ms. Lee is awarded front pay through September 1, 2000.

Accordingly, to the figures presented to this court and agreed upon by the parties, front pay would thus encompass $14,025 in bonuses, $83,222 in additional pension benefits, and $1,400 in insurance premiums.

Accordingly, **Plaintiff's Motion for Reinstatement or in the Alternative, Motion for Award of Front Pay Damages, and Supporting Memorandum of Law** (Doc. 83) is **GRANTED** to the extent that the Plaintiff is **AWARDED** a total front pay award of $98,647. This sum shall bear interest at the usual rate for federal court judgments. In all other respects, the motion is **DENIED**.

Done and Ordered at Tampa, Florida, this 26th day of August, 1998.

/s/ Thomas B. McCoun III
THOMAS B. MCCOUN III
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Counsel of Record

APPENDIX 5

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

ANDREA D. LEE,

Plaintiff,

v.

CASE NO.
95-1544-CIV-T-17E

GTE, FLORIDA INCORPORATED,

Defendant.

_____ /

ORDER AMENDING FINAL JUDGMENT

On April 7, 1998, the court entered Final Judgment in favor of the plaintiff, Andrea D. Lee, in the principal amount of $216,000. Therein, the court reserved and retained jurisdiction over the matter of front pay, fees, costs, and interest, if any. The court having now determined that the Plaintiff should appropriately receive front pay, the parties having stipulated to the amount of fees and costs, and the court finding Plaintiff to be the prevailing party, the Final Judgment is **AMENDED** to include the award of front pay in the sum of $98,647, together with attorney's fees and costs in the sum of $100,000, for a total award of $414,647, which sum shall bear interest at the usual rate for federal court judgments.

Done and Ordered at Tampa, Florida, this 28th day of August, 1998.

/s/ Thomas B. McCoun
THOMAS B. MCCOUN III
UNITED STATES DISTRICT JUDGE

Copies furnished to:
Counsel of Record

APPENDIX 6

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 98-3380-AA

ANDREA D. LEE,

Plaintiff-Appellee-
Cross-Appellant,

versus

GTE FLORIDA, INC.,

Defendant-Appellant-
Cross-Appellee.

On Appeal from the United States District Court
for the Middle District of Florida

(Filed Nov. 15, 2000)

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

(Opinion _____, 11th Cir., 19__, ___F.2d___).

Before: EDMONDSON and MARCUS, Circuit Judges, and HANCOCK*, District Judge.

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*Honorable James H. Hancock, U.S. District Judge for the Northern District of Alabama, sitting by designation.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Stanley Marcus
UNITED STATES CIRCUIT JUDGE